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No. 87-877

In the Supreme Court of the United States

OCTOBER TERM, 1987

TIMOTHY S. JOVANOVIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that, before accepting his guilty plea, the district court did not advise him of the maximum penalty that could be imposed.

1. After entering a plea of guilty in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing LSD, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to nine years' imprisonment, a three-year special parole term, and five years' probation. The court of appeals affirmed (Pet. App. A1-A11).

The pertinent facts are stated in the opinion of the court of appeals (Pet. App. A3-A6). At his arraignment on June 1, 1986, petitioner pleaded not guilty to the three counts against him. He was released on bond. On Friday, August 15, 1986, the district court revoked petitioner's bond and ordered him confined pending trial because he violated the conditions of his release by using controlled substances. During the following weekend petitioner decided to change his plea to guilty. *Id.* at A3.

On Monday, August 18, 1986, petitioner appeared in court to enter his plea. At the plea proceeding, the following colloquy took place (Pet. App. A3-A6):

> THE COURT: With regard to Count I [conspiracy] * * * [do] you understand on Count I, I can fine * * * you up to $250,000 and order * * * you to spend up to 20 years in jail, or [both] * * *?
>
> JOVANOVIC: Yes.
>
> * * * * *
>
> THE COURT: With regards to Counts VIII and X [distribution counts] do you understand that I can fine up to $250,000 on each of those counts and I can likewise incarcerate you for up to 20 years on each of those counts, plus a 3 year minimum special parole term * * *?
>
> JOVANOVIC: Yes, sir.
>
> * * * * * *
>
> THE COURT: So that the jail term on Jovanovic, the maximum—I am sure you have added it a few times—is what, 60 years?
>
> DEFENSE ATTORNEY: Yes, sir.
>
> THE COURT: Three years special parole term minimum and $750,000 in fines, is that right * * *?
>
> U.S. ATTORNEY: I get 50, Your Honor.
>
> THE COURT: 50 what?
>
> U.S. ATTORNEY: 50 years. 15 and 15 plus 30 and plus 20.
>
> * * * * *
>
> THE COURT: VIII and IX, at least down here they got 20 years.
>
> DEFENSE ATTORNEY: It should be 15.
>
> U.S. ATTORNEY: That's an error. It should be 15.

THE COURT: That's an error and it's an important error. So we have a total possible for Mr. Jovanovic of 50 years, is that right, Mr. Jovanovic?

JOVANOVIC: Yes, sir.

THE COURT: The fine we talked about is $750,000 and 3 year minimum special parole term * * *?

DEFENSE ATTORNEY: That's correct.

THE COURT: Mr. [U.S. Attorney]?

U.S. ATTORNEY: That's correct.

THE COURT: And Mr. Jovanovic?

JOVANOVIC: Yes.

U.S. ATTORNEY: Your Honor, let me correct that. With regard to the 5000 count, Count X, which is 5000 dosage unit, I believe that calls for 20 years.

There is an enhanced penalty based upon the number of grams.

* * * * *

THE COURT: So X is different from VIII?

U.S. ATTORNEY: I believe it is * * *.

* * * * *

U.S. ATTORNEY: Judge * * * Roman Numeral IV is the enhanced penalty provision with regard to LSD, based on the number of grams.

Should a defendant be convicted of 5 grams or more, possession or distribution, the enhanced penalty is 20 years instead of 15. We have that situation here with regard to Count X.

* * * * *

THE COURT: So you are saying instead of a total for Mr. Jovanovic would be 55 years, not 50 years?

U.S. ATTORNEY: That's right.

[At that point the district court directed petitioner's attorney to discuss with petitioner what had

transpired to determine if it would affect his decision to plead guilty.]

DEFENSE ATTORNEY: Judge, I conferred with Mr. Jovanovic and it makes no difference to the plea.

THE COURT: You know what we are talking about here, Mr. Jovanovic?

JOVANOVIC: Yes.

THE COURT: It's a total * * * [of] 55 years jail time that can conceivably be assessed by me against you under the statutes that apply to your plea here today, you know that you want to go ahead, do you?

JOVANOVIC: Yes, sir.

At the conclusion of the plea proceeding, the district court accepted petitioner's guilty plea.

Petitioner was sentenced on September 23, 1986. Petitioner subsequently moved to withdraw his guilty plea on the ground that the district court did not correctly advise him of the maximum sentence to which he was subject. The district court denied the motion.

2. On appeal, petitioner renewed his effort to withdraw his guilty plea. While characterizing the exchange regarding the maximum allowable sentence as "confusing," the court of appeals concluded that in the end the district court correctly advised petitioner that he was subject to a maximum prison term of 55 years (Pet. App. A6). The court of appeals further found that the district court did not inform petitioner that he could receive a lifetime special parole term (*id.* at A6-A7). The court concluded (*id.* at A8), however, that the error was harmless because the parole term imposed did not exceed the parole term that petitioner was told he could receive.

3. Petitioner renews his contention that the district court did not properly advise him of the consequences of his plea, as required by Fed. R. Crim. P. 11(c)(1). Specifically, he argues that the district court did not

clearly advise him of the maximum prison sentence to which he was subject, and that the court completely failed to inform him that he was subject to a lifetime special parole term.

It is true that the court at first erroneously advised petitioner as to the maximum prison sentence to which he was subject. Ultimately, however, the court correctly told petitioner that he was subject to a maximum prison term of 55 years (Pet. App. A5). Petitioner then consulted with counsel, after which the court asked petitioner directly if he wanted to go ahead with the plea in light of the "55 years jail time that can conceivably be assessed by me against you," and petitioner responded, "Yes, sir" (*id.* at A6). Accordingly, despite the initial confusion, petitioner was in the end clearly and accurately informed of the maximum prison term that could be imposed.[1]

It is also true that, although the court correctly told petitioner that he was subject to a mandatory minimum three-year special parole term (Pet. App. A4), the court neglected to inform petitioner that the special parole term could be as long as life. Nevertheless, as the court of appeals concluded (*id.* at A8), the error was harmless in light of the fact that the court actually imposed only the minimum three-year special parole term. Rule 11(h), Fed. R. Crim. P., provides that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." The Advisory Committee's notes make clear that any error by the court in understating the maximum penalty is harmless where "the penalty actually imposed did not exceed that in-

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[1] Rule 11(c)(1) provides in pertinent part that, before accepting a guilty plea, the court must inform the defendant of and determine that he understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term * * *."

dicated in the warnings * * *." Fed. R. Crim. P. 11(h) advisory committee notes, 1983 Amendment, 18 U.S.C. App. (Supp. IV) at 987-989.

Petitioner argues that the court of appeals' finding of harmlessness is inconsistent with this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969). In *McCarthy* the Court held that "prejudice inheres in a failure to comply with Rule 11" and that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." 394 U.S. at 471-472. But the *McCarthy* per se rule was adopted long before the enactment of Rule 11(h), at a time when Rule 11 required only a brief procedure during which the chance of a minor and insignificant deviation from the rule was relatively slight. Indeed, the Advisory Committee notes to Rule 11(h) make clear that the rule was adopted because some courts persisted in reading *McCarthy* "as meaning that the general harmless error provision in [Fed. R. Crim. P.] 52(a) cannot be utilized with respect to Rule 11 proceedings." Fed. R. Crim. P. 11(h) advisory committee note, *supra*, at 989.[2]

Petitioner further contends that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Sharon*, 812 F.2d 1233 (1987). In *Sharon*, however, the district court neglected to inform the defendant that he was subject to any special parole term, and it then proceeded to impose a ten-year special parole term. Accord-

[2] Even before the enactment of Rule 11(h) this Court held that relief under 28 U.S.C. 2255 " 'is not available when all that is shown is a failure to comply with the formal requirements of [Rule 11].' " *United States* v. *Timmreck*, 441 U.S. 780, 785 (1979) (quoting *Hill* v. *United States*, 368 U.S. 424, 429 (1962)). Citing *Timmreck*, petitioner argues that Rule 11(h) is inapplicable here because this case involves a direct appeal and not a collateral attack. But Rule 11(h) does not make any distinction between direct appeals from and collateral attacks on convictions resulting from guilty pleas.

ingly, *Sharon* is very different from this case, where the court informed the defendant that he was subject to a mandatory special parole term of at least three years and then imposed a term of precisely that length. See *United States* v. *Vela*, 606 F.2d 1224, 1225-1226 (D.C. Cir. 1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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